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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PACIFICO CREATIVE SERVICE, INC., d/b/a JALPAK, et al.,

Petitioners,

—against—

THOMAS J. HENNEGAN and GLORIA E. HENNEGAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Does the limitations period for an antitrust refusal to deal claim expire four years after plaintiff learns of the alleged decision not to deal?

2. Does Section 2(c) of the Robinson-Patman Price Discrimination Act apply when there is no allegation of price discrimination or a discount to the purchaser, but only a claim of commercial bribery?

Parties to the Proceeding

Plaintiffs/Respondents ("plaintiffs") are Thomas J. Hennegan and Gloria E. Hennegan.

Defendants/Petitioners ("defendants") are: (1) Pacifico Creative Service, Inc., doing business as Jalpak (now known as Creative Tours Micronesia, Inc.), (2) Micronesian Hospitality, Inc., (3) Ric Tours "Guam", Inc., (4) Yusen Air and Sea Service Pacific, Inc., doing business as Diamond Tours, (5) J.B. Siaotong Enterprises, Inc., doing business as Guam Travel Bureau, (6) Duty Free Shoppers, Ltd., a Hong Kong corporation, and (7) Hakubotan Enterprise, Inc. The first five defendants are the "defendant tour operators," and the last two are the "defendant retail shops."

The statements required by Rule 28.1 are set out at A16-A20.

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PACIFICO CREATIVE SERVICE, INC.,
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—against—

THOMAS J. HENNEGAN and GLORIA E. HENNEGAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners-defendants ("defendants") respectfully request that a writ of certiorari be issued to review (1) that portion of the decision of the United States Court of Appeals for the Ninth Circuit, filed April 17, 1986, that reversed in part the Memorandum Order of the District Court of Guam, dated September 5, 1984, which had granted defendants summary judgment, and (2) the Order of the Ninth Circuit, filed June 11, 1986, denying defendants' petition for rehearing with suggestion for rehearing en banc.

OPINIONS BELOW

The opinion of the District Court of Guam is not reported (A10-A15). The opinion of the Court of Appeals for the Ninth Circuit is reported at 787 F.2d 1299 (9th Cir. 1986) (A1-A7). The order of the Ninth Circuit denying defendants' petition for rehearing and rejecting defendants' suggestion for rehearing en banc is not reported (A8-A9).

JURISDICTION

The decision of the Court of Appeals was entered on April 17, 1986 (A1-A7). Defendants timely filed a petition for rehearing with suggestion for rehearing en banc. That petition was denied on June 11, 1986 (A8-A9). This Court has jurisdiction to review the decision of the Court of Appeals, and its denial of defendants' petition for rehearing with suggestion for rehearing en banc, by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(c) of The Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(c)

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect

control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Section 4b of the Clayton Act, 15 U.S.C. § 15b

§ 15b. Limitation of actions

Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

STATEMENT OF THE CASE

This case involves a belated attempt by Guam park vendors to sue a number of tour operators and retail shops for alleged antitrust violations. Plaintiffs claim that while the defendant retail shops allegedly pay the defendant tour operators for bringing tourists to their places of business and providing other services, plaintiffs refuse to make such payments.[1] As a result, plaintiffs allege, the defendant tour operators have refused to bring tourists to plaintiffs' park stand, and have "shepherded" them to the defendant retail shops.[2] Plaintiffs conclude that such alleged actions constitute a "refusal to deal"[3] or "group boycott"[4] resulting from "commercial bribery."[5]

Plaintiffs do not assert that the alleged payments by the retail shops involve price discrimination or a discount in the

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1 Plaintiffs' Appellate Brief ("P. Br.") at 2-3.

2 *Id.*

3 *See* P. Br. at 1, 10-11.

4 Compl. ¶¶ 19, 29, 39, 49, CR 1 at 9, 13, 17, 21-22. *See also* Compl. ¶¶ 15-18, 25-28, 35-38, 45-48, CR 1 at 7-8, 11-13, 15-17, 19-21.

5 Compl. ¶¶ 22, 26, 32, 42, CR 1 at 10, 11-12, 14, 18.

sale of goods by the retail shops. Indeed, the Complaint precludes any such assertion, alleging that the tourists/purchasers are unaware of the claimed payments.[6]

As the District Court and the Court of Appeals found, plaintiffs assertedly have been aware of the alleged refusal to deal that purportedly caused their claimed injury (lost sales) since at latest January 1979.[7] Plaintiffs also have asserted that the alleged refusal to deal has remained in effect unabated from its inception.[8] Plaintiffs nevertheless waited until June 1983 to bring this suit.

The Complaint plaintiffs ultimately filed claimed violations of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), and Section 3 of the Sherman Act, 15 U.S.C. § 3.[9] The District Court dismissed the Complaint in its entirety on defendants' motion for summary judgment. It held that plaintiffs' claims accrued outside of the four year antitrust limitations period, and are barred under 15 U.S.C. § 15b and the Ninth Circuit's decision in *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981):

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6 Compl. ¶¶ 15-17, 25-27, 35-37, 45-47, CR 1 at 7-8, 12-13, 15-17, 19-21.

7 Opinion of the Ninth Circuit at A6; Memorandum Order of District Court at A13; Plaintiffs' Motion to Disqualify Counsel, CR 53 at 3; Memorandum in Support of Plaintiffs' Motion to Disqualify Counsel, CR 58 at 1-3; Affidavit of Thomas J. Hennegan in Support of Motion to Disqualify Counsel ¶¶ c, d, e, CR 62 at 1-2; Transcript of Proceedings on Plaintiffs' Motion to Disqualify Counsel, CR 70 at 5, 10-15, 19; *Holden v. Hennegan* Trial Transcript at 248, 302, CR 104, Exh. B, C.

8 Compl. ¶¶ 15, 19, 25, 29, 35, 39, 45, 49, CR 1 at 7, 9, 11, 13, 15, 17, 19, 21-22.

9 The Complaint alleges that "[j]urisdiction over the subject matter of this case exists in [the District Court of Guam] pursuant to 48 U.S.C. § 1424(a) and 15 U.S.C. § 15." Compl. ¶ 9, CR 1 at 6.

> The Ninth Circuit in *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. den.* 454 U.S 816, 102 S. Ct. 92 (1981), held that defendant [Wedgwood's] initial refusal to sell its chinaware to plaintiff retailer Orgell, allegedly based on a conspiracy between defendant [Wedgwood] and plaintiff's principal competitor, triggered the four-year statute of limitations governing antitrust actions. The Ninth Circuit further held that subsequent refusals by defendant [Wedgwood] to sell its products to plaintiff did not create new antitrust causes of action but were merely reaffirmations of its original decision not to deal with the plaintiff.

Memorandum Order of District Court, A13.

The Ninth Circuit found that the Hennegans knew of the alleged refusal to deal, and of the asserted payments and "shepherding" of tourists, by at latest January 1979. A6. But rather than applying the decision in *Orgell*, the Court of Appeals stated that the initial refusal to deal in *Orgell* was "irrevocable, immutable, permanent and final" and thereby caused all of plaintiff's injury. A5. The Court reached this conclusion even though it acknowledged that "it is not evident from the brief factual summary [in *Orgell*] how the defendant's initial refusal to sell [in that case] caused all the injury to the plaintiff." A5. The Ninth Circuit further held that, in contrast to its view of the situation in *Orgell*, the refusal to deal alleged here is a continuing conspiracy characterized by asserted acts that allegedly caused plaintiffs new injury during the limitations period, *viz.*, allegations of "payments by the souvenir vendors to the tour operators and the tour operators' shepherding of tourists away from the Hennegans' shop and to the shops of the souvenir vendors." A3.

Defendants timely filed a petition for rehearing with suggestion for rehearing en banc. The Ninth Circuit denied the petition. A8-A9.

REASONS FOR GRANTING THE PETITION

I. The Court Should Decide Whether The Limitations Period For An Antitrust Refusal To Deal Claim Expires Four Years After Plaintiff Learns Of The Alleged Decision Not To Deal, In Order To Establish Consistency With Its *Zenith* Decision And Uniformity Among And Within The Courts of Appeals.

After assertedly learning of the claimed refusal to deal, plaintiffs did not sue for over four years. Question 1 warrants review by the Court because the Ninth Circuit's decision conflicts with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and would effectively annul the statute of limitations in an antitrust refusal to deal case. The Court also should decide this question in order to resolve the conflict on this point among the Courts of Appeals and within the Ninth Circuit.

A. Plaintiffs' Claims Are Barred Under 15 U.S.C. § 15b And This Court's Decision In *Zenith*, Since, Under Plaintiffs' Assertions, Their Only Injury Resulted From An Unbroken Decision Not To Deal Made More Than Four Years Before This Suit Was Brought.

An antitrust claim is "forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. This Court has stated that "[g]enerally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith*, 401 U.S. at 338.

Defendants submit that when an antitrust claim is based on an alleged unbroken refusal to deal, the "act that injures plaintiff's business" would occur when defendant first refused to deal with plaintiff; no new injury or cause of action would arise from the continuation of the refusal to deal, iterations of the initial refusal or conduct implementing the refusal. Such

actions would be simply "a reaffirmation of the original decision not to deal with the plaintiff." *Orgell*, 640 F.2d at 938. *See also In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71-72 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979).[10]

In this case, plaintiffs only claim injury resulting from an alleged refusal to deal that plaintiffs assert has been in effect without interruption since at latest January 1979. The Ninth Circuit nevertheless sought to fit this case within the "continuing conspiracy" application of the rule in *Zenith*,[11] stating that the alleged payments and "shepherding" caused new asserted injury to plaintiffs during the limitations period, and that the refusal claimed here was not necessarily "immutable." A3-A4.

This holding misapplies *Zenith*. The alleged payments and "shepherding" of tourists were simply the purported motivation for and manifestation of the alleged refusal. They caused plaintiffs no harm that was new or different from that allegedly caused by the claimed initial decision not to deal with plaintiffs. And while, according to the Ninth Circuit, the defendant tour operators could have changed their minds and dealt with plaintiffs, plaintiffs have asserted that the tour operators have not done so. Under *Zenith*, plaintiffs' alleged injury occurred, and their asserted claims accrued, at the time of the claimed pre-limitations decision to refuse to deal with them.

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10 *Accord Sakamoto v. Duty Free Shoppers, Ltd.*, 613 F. Supp. 381, 391 (D. Guam 1983), *aff'd on other grounds*, 764 F.2d 1285 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1457 (1986). Plaintiffs have conceded that the antitrust claims in *Sakamoto* were properly dismissed under the statute of limitations. *See* Memorandum of Plaintiffs in Opposition to Motion for Summary Judgment, CR 102 at 12-13.

11 *See* 401 U.S. at 338 ("In the context of a continuing conspiracy to violate the antitrust laws, . . . [the rule that the statute of limitations begins to run when defendant commits an act that injures plaintiff] has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.")

The opinion of the Ninth Circuit in this case will have substantial undesirable implications if it is not reversed. It would allow a plaintiff in a refusal to deal case to avoid the statute of limitations and *Zenith* merely by alleging that those with whom the defendant did deal paid for and received goods or services during the limitations period, or that defendant hypothetically could have changed its decision and dealt with plaintiff, although it did not. Indeed, the decision below would allow a plaintiff in such a case to avoid a statute of limitations bar simply by making a "forlorn inquiry" to deal with defendant, and receiving the expected negative response.

Such a result would undermine the decision in *Zenith*, and the purposes of statutes of limitations to allow repose and avoid the litigation of stale claims. *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). It would place control of the statute of limitations in plaintiff's hands even after the four year period had expired, and would subject the courts to claims that had been revived by, for example, the expedient of a knowingly futile telephone call or letter.

B. The Courts Of Appeals Are In Conflict On This Issue

The Courts of Appeals are in conflict on the issue of whether a cause of action for an alleged unbroken refusal to deal accrues upon the claimed initial refusal. The Second, Sixth and Seventh Circuits, and the Temporary Emergency Court of Appeals, have issued decisions in accord with *Orgell*. The Fourth, Fifth and the Eighth Circuits have taken contrary approaches, allowing a plaintiff to avoid a limitations bar simply by inducing the defendant to iterate its prior decision not to deal with plaintiff.

In *Woodbridge Plastics, Inc. v. Borden, Inc.*, 473 F. Supp. 218 (S.D.N.Y.), *aff'd*, 614 F.2d 1293 (2d Cir. 1979), the plaintiff bought from defendant Borden certain raw materials from which it manufactured a plastic compound. When Bor-

den began selling plaintiff only limited quantities of the raw materials, plaintiff's principal customers (defendants Pickwick and its subsidiary Keel) began to deal directly with Borden, and informed plaintiff that they considered their supply contracts terminated. Four years and three months later, plaintiff brought suit under the Sherman Act, challenging Pickwick and Keel's refusal to buy any longer from plaintiff.

Plaintiff claimed that it suffered injury from two overt acts during the limitations period—an arbitration proceeding brought by Keel with respect to its contract with plaintiff, and Borden's shipment of the raw materials to Pickwick. The court did not find such acts significant from a limitations standpoint. By commencing the arbitration proceeding, Keel "was merely carrying out an intention [to refuse to deal with plaintiff] it had announced some four months earlier. . . ." 473 F. Supp. at 222. The date of the shipment to Pickwick also was irrelevant, because plaintiff's injury occurred when plaintiff learned that Pickwick and Keel had contracted with Borden and deemed their contracts with plaintiff terminated. *Id.* The court was not dissuaded from this conclusion by Pickwick and Keel's receipt of, and payment for, supplies from Borden during the limitations period. Nor did the court believe that it was required to find that Pickwick and Keel's decision to refuse to deal with plaintiff was immutable.

The Sixth Circuit has followed the same approach. In *Fontana Aviation, Inc. v. Baldinelli*, 418 F. Supp. 464 (W.D. Mich. 1976), *aff'd*, 575 F.2d 1194 (6th Cir.), *cert. denied*, 439 U.S. 911 (1978), defendants Hertz and Avis replaced an airport representative, plaintiff Fontana, with defendant Baldinelli. Hertz and Avis stopped paying Fontana as of May 1, 1969, and Avis thereupon announced in the newspaper that it had "pulled out" from the airport. Over four years later, plaintiff filed suit under Section 1 of the Sherman Act, 15 U.S.C. § 1. The court held that the suit was time barred, even though Hertz and Avis had sent Fontana a letter during the limitations period inform-

ing him that their relations with him had been terminated. The court rejected the argument that defendants had engaged in a "continuing conspiracy," stating that "[t]he 'pullout' was the specific act which gave rise to the damages which Fontana argues continue to this day; [the] later incidents [were] but its consequences." 418 F. Supp. at 470.

In another Sixth Circuit decision, *Garelick v. Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963), plaintiffs had been distributors for defendant's products. Defendant ceased doing business with plaintiffs in 1956. Plaintiffs brought an antitrust refusal to deal case in 1962, and alleged that defendant had failed to respond to plaintiffs' requests to be reinstated during the limitations period. The court held that while those failures to respond might constitute "overt acts," they had caused no new injury or damage. "The incidents were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiffs-appellants." (*Id.* at 856). *Accord Sherman v. Goerlich's, Inc.*, 238 F. Supp. 728, 730 (E.D. Mich. 1963), *aff'd*, 341 F.2d 988 (6th Cir.), *cert. denied*, 382 U.S. 830 (1965).[12]

A string of decisions by the Seventh Circuit also fits this pattern. For instance, in *2361 State Corp. v. Sealy, Inc.*, 402 F.2d 370, 374 (7th Cir. 1968), the court held that plaintiff's

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12 In *Barnosky Oils, Inc. v. Union Oil Co. of California*, 665 F.2d 74 (6th Cir. 1981), the defendant oil company allegedly used its contract with plaintiff Barnosky to coerce Barnosky to stop dealing with a particular customer. More than four years after Barnosky agreed to cease sales to that customer, it brought suit under Section 1 of the Sherman Act, alleging that it had been injured by that refusal to deal. Despite the allegation that defendant had invoked its contract with Barnosky for this purpose repeatedly during the limitations period, the court concluded that plaintiff's alleged injury occurred outside of the limitations period, and that the actions during the limitations period were " 'merely the abatable but unabated inertial consequences of some pre-limitations action.' " 665 F.2d at 81, *quoting Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

cause of action under Section 1 of the Sherman Act accrued when "[plaintiff's] business was injured by the cessation of [defendant's] purchases." *Accord Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788 (7th Cir. 1964) (former exclusive distributor's antitrust conspiracy claim was time-barred because injury occurred, and cause of action accrued, upon termination of his franchise agreement); *Emich Motors Corp. v. General Motors Corp.*, 229 F.2d 714 (7th Cir. 1956) (claim under Section 1 of the Sherman Act accrued when defendant terminated the contract pursuant to which it sold cars to plaintiff).

The Temporary Emergency Court of Appeals has adopted the same principles, albeit not in an antitrust case. In *Siegel Oil Co. v. Gulf Oil Corp.*, 556 F. Supp. 302 (D. Colo. 1982), *aff'd*, 701 F.2d 149 (Em. Ct. App. 1983), defendant Gulf Oil refused to continue supplying gasoline to the plaintiff, and designated a substitute supplier. The plaintiff protested repeatedly by letter, in a personal meeting, and by administrative proceeding. Finally, it commenced a lawsuit for damages, contending that the defendant's refusal to supply it constituted "a continuing violation." 701 F.2d at 153. The court rejected this argument, noting plaintiff's assertion that Gulf's refusal was "absolutely unwavering," *id.*, and relying on the decision in *Orgell*: "Because Gulf's decision was final at the time it designated . . . Siegel's substitute supplier, Siegel's injury was a direct result of [that designation] and Siegel's cause of action accrued at that time." *Id.* Defendant's presumed ongoing sales to, and receipt of payments from, other customers did not affect the court's analysis. Nor did the court find any reason why defendant could not have changed its mind and sold to plaintiff.[13]

In sharp contrast to these decisions, the Fourth, Fifth and Eighth Circuits have issued decisions comparable to the Ninth

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13 *Accord Shell Oil Co. v. Nelson Oil Co.*, 627 F.2d 228 (Em. Ct. App.), *cert. denied*, 449 U.S. 1022 (1980), as described in *Siegel*, 556 F. Supp. at 308 (finding last injurious act to be the initial refusal to accept credit card receipts for cash).

Circuit's decision here. They have allowed a plaintiff to avoid a statute of limitations bar to a refusal to deal claim by alleging some behavior—even a word—during the limitations period that simply reflected the continuation of the asserted refusal to deal.

Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), involved an alleged conspiracy among the defendants to refuse to sell advertising accessories to the plaintiff. Although defendants had stopped selling to plaintiff in 1961, plaintiff did not bring its antitrust suit until 1969. Reversing the district court, the Fifth Circuit stated that the action would not be time-barred if the plaintiff could demonstrate some "act or word of refusal" precluding plaintiff from obtaining supplies from defendant during the limitations period. *Id.* at 128.

Similarly, the Eighth Circuit in *Pioneer Co., Inc. v. Talon, Inc.*, 462 F.2d 1106 (8th Cir. 1972), held that a jobber's refusal to deal claim did not accrue when the defendant terminated business relations with him. The court concluded that the defendant's refusals to fill orders the jobber placed subsequent to his termination caused injury during the limitations period for which plaintiff was entitled to recover. *Id.* at 1108.[14] And in *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d

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14 The confusion in this area is emphasized by the *Pioneer* court's attempt to distinguish the Seventh Circuit's decision in *Emich Motors* on the ground that Emich had been a "formal dealer" of GM, while Pioneer was a jobber without a contractual relationship with the supplier. The court held that therefore the cancellation of Emich's contract was a final act which started the running of the limitations period, 462 F.2d at 1108, but that the defendant's notification to Pioneer that it would no longer fill its orders was part of a "continuing conspiracy" under which Pioneer suffered new injury every time it placed a futile order. *Id. See also Poster Exchange*, 517 F.2d at 126-27 (where plaintiff's business is "immediately and permanently destroyed . . . suit must be brought within the limitations period and upon the initial act," while the exclusion of plaintiff from an industry, "while perhaps unequivocal, was not of necessity permanent" and constitutes a continuing violation).

570, 572-73 (4th Cir. 1976), the Fourth Circuit made clear its position that the mere iteration by defendant during the limitations period of its decision to refuse to deal with plaintiff would cause plaintiff new injury and start the limitations period running anew.

C. The Ninth Circuit's Decision Is Irreconcilable With Its Prior, Controlling Decision In *Orgell*

It is well established that a decision by a Ninth Circuit panel with regard to the issues involved in a later Ninth Circuit case must be applied with controlling effect by the panel in that later case.[15] Only the Ninth Circuit en banc may reach a contrary result.[16]

In this case, the Ninth Circuit panel failed to accord *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981), the controlling effect it warranted, and created an irreconcilable conflict within the Ninth Circuit.

Orgell, a retailer, had claimed that Wedgwood, a china manufacturer, had refused to sell its products to plaintiff as a result of a conspiracy between Wedgwood and Geary, a customer of Wedgwood and one of plaintiff's competitors. Wedgwood initially refused to sell to Orgell in 1965, and repeated that refusal, in response to Orgell's requests to deal, in 1968, 1972, 1976, and 1977. Orgell sued in 1978, and argued that it was entitled to damages for the four years prior to its

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15 *United States v. Jenson*, 450 F.2d 1258, 1264 (9th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972) (panel decision "is binding upon all other panels of the court").

16 *Ellis v. Carter*, 291 F.2d 270, 273 n.3 (9th Cir. 1961) ("A decision of this court can be overruled only in an en banc proceeding."); *Upton v. Commissioner of Internal Revenue*, 283 F.2d 716, 723 (9th Cir. 1960), *cert. denied*, 366 U.S. 911 (1961) ("this court could not, except in en banc proceedings, hold in favor of the [defendant] if in another case this court has reached a contrary result in deciding the same question").

filing of the suit because the alleged conspiracy had continued to date.

The district court granted Wedgwood's motion for summary judgment on the ground that plaintiff had not commenced suit within four years after the claim accrued. The Ninth Circuit affirmed, stating:

> [A]ny injury to Orgell resulted from Wedgwood's 1965 refusal to sell. Orgell's subsequent requests "were forlorn inquiries by one all of whose reasonable hopes had been previously dashed." The district court's order granting summary judgment stated, "each time Wedgwood repeated the refusal, it was a reaffirmation of the original decision not to deal with the plaintiff. Since the original refusal pursuant to the alleged conspiracy occurred over a dozen years ago, this action is time-barred by the four year statute of limitations." We agree.

640 F.2d at 938 (citation omitted).

The Ninth Circuit panel in this case sought to distinguish *Orgell*, declaring that the refusal alleged there was "irrevocable, immutable, permanent and final," while hypothesizing that in the instant case the alleged payments and "shepherding" could have caused new injury to plaintiffs during the limitations period. A3-A5. However, no meaningful distinction exists between *Orgell* and this case.

In *Orgell*, the Ninth Circuit upheld the statute of limitations bar because the plaintiff's requests to deal within the limitations period " 'were forlorn inquiries by one all of whose reasonable hopes had been previously dashed.' " 640 F.2d at 938, *quoting In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979). It was not a question of whether the refusal to deal was immutable, but of whether the refusal was firmly in place. No reason was given why Wedgwood could not have changed its mind and sold china to the plaintiff.

Similarly here, under plaintiffs' assertions, the alleged refusal to deal was firmly in place by January 1979 and remained consistently in effect thereafter. *See supra* at 4. The Hennegans' "reasonable hopes," like those of Orgell, assertedly "had been . . . dashed" outside of the limitations period.

The claimed "shepherding" of tourists and payments here also fail to support any distinction from *Orgell*. Both cases involve allegations that defendant refused to deal with plaintiff while dealing with one or more of plaintiff's competitors. While plaintiffs here have asserted that the tour operators have "shepherded" tourists to the defendant retail shops but not to plaintiffs' place of business, Orgell complained that Wedgwood "shepherded" chinaware to Geary but not to plaintiff's store. And while plaintiffs here have alleged that the defendant retail shops pay the tour operators to bring tourists to them and provide other services, Geary no doubt paid Wedgwood to supply chinaware to it. As in *Orgell*, plaintiffs' claimed injury here resulted from the asserted pre-limitations decision to refuse to deal with them, not from any subsequent alleged implementations or manifestations of that asserted decision.

Thus, the decision below directly conflicts with the Ninth Circuit's governing precedent in *Orgell*. The Court should decide Question 1 to end this conflict, resolve the conflict among the Circuits, and preserve the integrity of its decision in *Zenith*.[17]

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17 By refusing to comply with its own requirement that a decision by a panel of the Ninth Circuit must be followed by subsequent Ninth Circuit panels unless the decision has been overruled by the Ninth Circuit en banc, the Ninth Circuit has "departed from the accepted and usual course of judicial proceedings" (S. Ct. Rule 17.1(a)), and has undermined the integrity of the substantive rules and procedures on which parties must be able to rely in litigating cases and conducting their affairs. The Court therefore also should decide Question 1 in the exercise of its supervisory power over the federal courts, in order to uphold the fundamental tenets of judicial administration that a court should follow its own procedures and adhere to the

(footnote continued)

II. The Court Should Decide Whether Section 2(c) Of The Robinson-Patman Price Discrimination Act Applies Absent Price Discrimination Or A Discount To The Purchaser, In Order To Establish Consistency With The Decisions Of This Court And The Congressional Intent, End The Present Conflict Among And Confusion Within The Courts Of Appeals, And Prevent The Unintended Expansion Of The Antitrust Treble Damages Remedy.

Plaintiffs allege no price discrimination or discount in the sale of goods by the retail shops. Indeed, the Complaint precludes such an allegation. *See supra* at 4. Rather, plaintiffs allege payments by the defendant retail shops to the defendant tour operators, and conclude that such payments constitute "commercial bribery"[18] proscribed by Section 2(c) of the Robinson-Patman Price Discrimination Act.[19]

The Ninth Circuit has stated that Section 2(c)'s "application is not limited to situations of price discrimination, but also encompasses commercial bribery." *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 696 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) (*citing Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966)).

The Court should review Question 2 because: (1) the Ninth Circuit's position is inconsistent with two decisions of this Court and the Congressional intent in enacting Section 2(c); (2) there is a split among, and confusion within, the Courts of Appeals on this recurring issue; and (3) the Ninth Circuit's

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principle of *stare decisis*. *See Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 260 (1953); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 700 (1978). *See also id.* at 709 n.6, 717 (Powell, J. concurring and Rehnquist, J. dissenting).

18 Compl. ¶¶ 22, 26, 32, 42, CR 1 at 10, 11-12, 14, 18.

19 *See* "Popular Name Acts," U.S.C.A. Title 15, Commerce and Trade, §§ 12 to 20 (1973) at XIX.

position is inconsistent with this Court's emphasis on limiting the antitrust treble damages remedy to persons injured by the type of conduct the antitrust laws were enacted to prevent.[20]

A. The Ninth Circuit's Position Is Inconsistent With This Court's Decisions In *Broch* And *Boston & Maine* And The Congressional Intent With Regard To Section 2(c).

Section 2(c), 15 U.S.C. § 13(c), provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

This language has been criticized as being ambiguous.[21]

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20 This issue was not raised below in connection with the summary judgment motion involved in this petition. However, given the Ninth Circuit's decisions in *Calnetics* and *Rangen*, it is appropriate for the Court to consider this question. *Hormel v. Helvering*, 312 U.S. 552, 556-59 (1941) (reviewing court may, in appropriate circumstances, consider legal issues not pressed or passed upon below). *See also Youakim v. Miller*, 425 U.S. 231, 235 (1976).

21 *See, e.g., Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371 (3d Cir. 1985) (*quoting* C. Austin, Price Discrimination 106 (1959) (§ 2(c) is "undoubtedly the most ambiguous and faultily drafted section of the Act")); M. Yeager, Brokerage Problems and Commercial Bribery, 53 Antitrust L.J. 1029 (1984) (footnotes omitted) ("Linguistically, Section 2(c) is a genuine piece of art. It has 115 words, all in one sentence. There are no semicolons, no clauses, just a few commas—and there has even been a debate about whether the commas are in the right places").

The only decision of this Court directly addressing Section 2(c) interprets it as a price discrimination statute. In *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166 (1960), the Court held that Section 2(c) proscribed price concessions to a buyer that were funded by a reduction in the commissions of the seller's broker. In discussing the scope of Section 2(c), the Court relied heavily on the legislative history of the Robinson-Patman Price Discrimination Act as a whole, and of Section 2(c) in particular.

The Court noted that the price discrimination provisions in Section 2 of the Clayton Act, which the Robinson-Patman Act amended, were easily evaded.[22] It stated that the purpose of the Robinson-Patman Act was "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Broch*, 363 U.S. at 168.[23]

The Court emphasized that Section 2(c) was aimed at the abuse of the brokerage function as a means of effectuating discriminatory discounts:

> A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means

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22 363 U.S. at 169 and n.3. *See also* 80 Cong. Rec. 7759 (1936) (statement of Congressman Patman); 80 Cong. Rec. 6622 (1936) (statement of Congressman Miller) ("Section 2 of the Clayton Act prohibited price discrimination, but carved so many exceptions from it, and stated them in such loose language, that it has fallen short of its purpose; . . . It dealt not at all with discriminations outside the realm of price discriminations between customers, through the perversion of the brokerage function. . . .").

23 80 Cong. Rec. 6622 (1936) (statement of Congressman Miller) (The Robinson-Patman bill was "aimed at the three principal forms in which price discriminations and preferences [were in 1936] prevalently practiced in the channels of trade. These are the excessive quantity discount, the corrupted brokerage payment or allowance, and allowances in the pretended payment of advertising and promotional services.").

> of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act.

Broch, 363 U.S. at 168-69 (footnotes omitted).

The legislative history underscores Congress' intent to apply Section 2(c) to a "prevalent form of discrimination" involving "secret" price concessions[24] obtained by "the exaction of brokerage commissions or allowances where true brokerage services have not been rendered." 80 Cong. Rec. at 6623 (1936).[25] While the "dummy" brokerage device "was not the only means by which the brokerage system was abused," 363 U.S. at 169, the Court in *Broch* stressed that Section 2(c) was intended to cover the "means by which brokerage could be

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24 *See Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959) (noting that "[d]uring congressional debates . . . there were continual references to the subsection (c) . . . practices as 'secret' discriminations"); 80 Cong. Rec. 8126 (1936) (statement by Mr. Crawford) (denouncing "secret rebates", "secret discounts" and "confidential prices" arranged by "chain brokers"); 80 Cong. Rec. 8132 (1936) (statement by Mr. Martin) (this legislation, "to prohibit unreasonable quantity discounts and false brokerage and false advertising allowances, which are in reality rebates, bonuses, subsidies," is analogous to "the many State laws which were enacted to abolish secret rebates, and rate and service discriminations").

25 *See* S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936) ("discriminations are sometimes effected directly in prices or terms of sale, and sometimes by separate allowances to favored customers for purported services or other considerations which are unjustly discriminatory in their result against other customers."); H.R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 15 (1936) ("Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made."); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936) (same).

used to effect price discrimination." *Id.* Plaintiffs here do not allege any price discrimination or discount in the sale of goods by the retail shops. They solely conclude that defendants have engaged in "commercial bribery."

In a subsequent decision addressing Section 10 of the Clayton Act, 15 U.S.C. § 20, this Court considered whether commercial bribery should be treated as an antitrust matter. It rejected such a conclusion, stating that: "Bribery might well be in the family of offenses covered under a conflict of interest statute. But it is more remote from an antitrust frame of reference." *United States v. Boston & Maine Railroad*, 380 U.S. 157, 162 (1964).

Notwithstanding these decisions and compelling evidence of Congressional intent, the Ninth Circuit in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), held that Section 2(c) proscribed the bribing of the superintendent of an Idaho fish hatchery by a fish food manufacturer to obtain the State of Idaho's fish food business. No price discrimination was involved, nor did the buyer receive any of the payments as a discount, secret or otherwise.

The court conceded that "in enacting section 2(c), the prime concern of Congress was to curtail price discriminations accomplished by pseudo-brokerage arrangements." *Id.* at 856. It nevertheless expanded the coverage of that statute, asserting that: the *Broch* Court had "expressed the view that the legislative history demonstrates a Congressional intent to proscribe other practices such as the bribing of a seller's broker by the buyer," *id.*;[26] and that "Section 2(c) is to be construed independently, without reference to the price discrimination section" (Section 2(a)) of the Robinson-Patman Price Dis-

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26 In support of this proposition, the Ninth Circuit cited to "a footnote (page 169)" in *Broch* (presumably 363 U.S. at 169-70 n.6), and noted that *Broch* had referred to 80 Cong. Rec. 7759-60, 8111-12 (1936). 351 F.2d at 856 and 856 n.2.

crimination Act. *Id.* at 857.[27] The court also disregarded the above-mentioned language in *Boston & Maine* as not "a definitive ruling." *Rangen*, 351 F.2d at 857.

The Ninth Circuit in *Rangen* failed to recognize that the *Broch* Court had mentioned the "bribing of a seller's broker by the buyer" simply as one of the "means by which brokerage could be used to effect price discrimination," presumably because the purpose of a buyer's bribing a seller's broker would be to secure a price preference. *Broch*, 363 U.S. at 169 and 169 n.6. The Ninth Circuit also failed to appreciate that Section 2(c)'s "independence" from Section 2(a) should be understood as part of Congress' plan to force hidden price discriminations into the open by depriving them of some of the defenses available to overt price discrimination under Section 2(a), 15 U.S.C. § 13(a). *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959). And, although the decision in *Boston & Maine* did not directly construe Section 2(c), it involved the Clayton Act, to which the Robinson-Patman Act is an amendment, and indicated that bribery is not part of an *antitrust* frame of reference. *Boston & Maine*, 380 U.S. at 162.

Despite the fallacies in *Rangen*, the Ninth Circuit relied on that decision in *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976), in stating that Section 2(c)'s "application is not limited to situations of price discrimination, but also encompasses commercial bribery." 532 F.2d at 696. This view is inconsistent with *Broch*, *Boston & Maine*, and Section 2(c)'s legislative history, and the Court should address this issue to vindicate its decisions and the Congressional intent.

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27 *See Broch*, 363 U.S. at 170-71 and 171 n.8, *citing* H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936) (reference to brokerage in § 2(a) deleted because "brokerage is dealt with in a subsequent subsection of the bill").

B. The Courts Of Appeals Are In Conflict And Disarray On This Recurrent Issue.

This question of the scope of Section 2(c) in this regard has resulted in conflict and confusion among and within the Circuits. Relying on pre-*Broch* cases and failing even to consider the legislative history, the Fourth Circuit has taken the same position as the Ninth. *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 716 F.2d 245 (4th Cir. 1983). Other Circuits have disagreed or are confused or contradictory on this issue.

The First Circuit. The decision in *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 25 (1st Cir. 1981), interprets Section 2(c) as a price discrimination statute. The court understood *Broch* to require that the broker "was interposed as a device or sham to give the favored customer a competitive advantage through a lower price," and stated that "§ 2(c) is designed to prevent violation of the basic § 2(a) price discrimination prohibition under different guise." *Id.*

The Second Circuit. Although it has not squarely addressed this issue, the Second Circuit appears to require a discount in lieu of brokerage or price discrimination effected by brokerage devices in order for a claim to be cognizable under Section 2(c). *Empire Rayon Yarn Co. v. American Viscose Corp.*, 364 F.2d 491 (2d Cir. 1966) (en banc), *vacating and endorsing the dissenting opinion in* 354 F.2d 182, 191 (2d Cir. 1965) (Moore, J., dissenting), *cert. denied*, 385 U.S. 1002 (1967).

The Third Circuit. In *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367 (3d Cir. 1985), the Third Circuit expressed doubt that Section 2(c) should be applied to commercial bribery, stating that "[t]here is good reason to question whether Congress intended to sweep commercial bribery within the ambit of section 2(c)." *Id.* at 372. Nevertheless, even as the court noted that "[t]he antitrust laws were never meant to be a

panacea for all wrongs,"[28] it stated that "we are not inclined to take issue with three Courts of Appeals which found that certain events constituting commercial bribery came within the terms of 2(c)." *Id.*[29]

The Fifth Circuit. The Fifth Circuit in *Excel Handbag Co., Inc. v. Edison Brothers Stores, Inc.*, 630 F.2d 379, 387 (5th Cir. 1980), "specifically" refused to reach a conclusion that commercial bribery alone could constitute a violation of Section 2 of the Robinson-Patman Price Discrimination Act, after finding that there was insufficient evidence of such conduct in that case. Although they do not concern "commercial bribery," other Fifth Circuit decisions apparently make price discrimination or dummy brokerage a requirement for a Section 2(c) violation. *Compare Thomasville Chair Co. v. Federal Trade Commission*, 306 F.2d 541, 545-46 (5th Cir. 1962) (holding that, under *Broch*, a discount giving effect to reduced commissions paid by the seller violates Section 2(c) only if the discount is "discriminatory"),[30] *with Gibson v. Federal Trade Commission*, 682 F.2d 554, 570 (5th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) ("Section 2(c), in light of the language and purpose, requires no price discrimination in a situation of dummy brokerage such as is involved here.").

The Sixth Circuit. The Sixth Circuit's position is unclear. A pre-*Broch* decision, *Fitch v. Kentucky-Tennessee Light &*

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28 *Id.*, *quoting Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

29 The reference to three Courts of Appeals included the Sixth and Seventh Circuits, as well as the Ninth. *Seaboard Supply*, 770 F.2d at 372, *citing Rangen, Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976), and *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943). *But see infra* at 24, for a discussion of the law of the Sixth and Seventh Circuits.

30 *See Allen Pen*, 653 F.2d at 25 (citing *Thomasville Chair* for the conclusion that "§ 2(c) is designed to prevent violation of the basic § 2(a) price discrimination prohibition under different guise").

Power Co., 136 F.2d 12, 14 (6th Cir. 1943), applied Section 2(c) to a commercial bribery case. However, a 1981 decision in a district court in the Sixth Circuit granted defendants summary judgment on the ground that a Section 2(c) claim cannot be sustained absent an allegation of price discrimination. *Howell Industries, Inc. v. Sharon Steel Corp.*, 532 F. Supp. 400, 406-08 (E.D. Mich. 1981). The court cited *Broch* in stating that:

> the Robinson-Patman Act must be construed as a harmonious whole, and the latter sections, while having independent significance in their specific provisions, address various practices resorted to as a means of avoiding the broad price discrimination prohibitions. . . . The caselaw applying section 2(c) has noted this fact and has construed the Section to include an element of disguised price discrimination.

Id. at 406. The court further stated that the cases "do not satisfactorily explain the significance of *Fitch* and other commercial bribery cases in light of the holding of *Broch*," *id.* at 407, and concluded that:

> Absent clearer authority from this circuit that at least indirect price discrimination is not required under Section 2(c), and in light of the reasoning in *Broch* and *Allen Pen*, I cannot conclude that Plaintiff's allegations under Section 2(c) are sufficient to withstand Defendant's motion.

Id. at 407-08.

The Seventh Circuit. In *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976), the Seventh Circuit held that Section 2(c) reached commercial bribery. But in the subsequent decision in *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), the court stated that "Section 2(c) was enacted in order to prevent discriminatory rebates granted large sellers under the guise of 'brokerage fees' never actually earned."

The Eighth Circuit. The Eighth Circuit came down on both sides of the issue in a single decision. In *Ideal Plumbing Co. v. Benco, Inc.*, 529 F.2d 972 (8th Cir. 1976), the court construed *Broch* as "emphasizing that discrimination is in fact an element of the statutory proscription." *Id.* at 976 n.3. On the next page, however, demonstrating its confusion within a single sentence, the court stated that "Congress also intended Section 2(c) to reach *price* arrangements equivalent to illicit brokerage, such as commercial bribery . . . ." *Id.* at 977 (emphasis added).

The Court should address this issue to remedy the pervasive discord and confusion among and within the Circuits in this regard.

C. Commercial Bribery Is Not The Type Of Conduct That The Antitrust Laws, With Their Treble Damages Remedy, Were Intended To Cover.

The antitrust treble damages remedy[31] is an extremely potent weapon and should be available only where Congress intended. *See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). While certain price discriminations have antitrust implications, bribery does not. *See Boston & Maine*, 380 U.S. at 162. It should not, without clear evidence of Congressional intent, be incorporated into the "antitrust frame of reference," and be accorded the exceptional remedies available there. The Court should review this issue to prevent the misuse of Section 2(c) by plaintiffs seeking treble damage windfalls.[32]

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31 *See* Section 4 of the Clayton Act, 15 U.S.C. § 15.

32 *Cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (discussing desirability of "eliminat[ing] treble damages from private state tort suits masquerading as antitrust actions"); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 655 (7th Cir. 1984) (no antitrust claim stated where factual allegations at most describe "a species of unfair competition").

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion Of The United States Court Of Appeals For The Ninth Circuit Affirming In Part And Reversing In Part The Memorandum Order Of The District Court of Guam, 787 F.2d 1299 (Filed April 17, 1986)

FOR PUBLICATION
FILED
APR 17 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Decided April 17, 1986

No. 84-2563

D.C. NO. C 83-0040 CCD

OPINION

THOMAS J. HENNEGAN and Gloria Hennegan,

Plaintiffs-Appellants,

—v.—

PACIFICO CREATIVE SERVICE, INCORPORATED, d/b/a Jalpak, Micronesian Hospitality, Inc., Ric Tours "Guam", Inc., Yusen Air and Sea Service Pacific, Inc., et al,

Defendants-Appellees.

Appeal from the District Court of Guam

Cristobal C. Duenas,
District Judge, Presiding

Argued and Submitted Nov. 13, 1985
San Francisco, California

Before:

WALLACE, ANDERSON, and PREGERSON,
Circuit Judges.

WALLACE, *Circuit Judge*:

The Hennegans appeal from the district court's order granting summary judgment to appellees on the ground that the Hennegans' antitrust claims were barred by the statute of limitations. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and reverse and remand in part.

I

The Hennegans own and operate a gift and souvenir shop in Guam. Appellees are five businesses that conduct organized tours of Guam (the tour operators) and two businesses operating gift and souvenir shops in Guam (the souvenir vendors). On June 14, 1983, the Hennegans filed a complaint alleging that the tour operators and souvenir vendors had engaged in illegal restraints of trade in violation of section 3 of the Sherman Act, 15 U.S.C. § 3, and section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c). The Hennegans charged that the tour operators shepherded tourists to the shops of the souvenir vendors—and away from their shop—in exchange for unlawful payments.

In ruling on the motion for summary judgment, the district court concluded that the Hennegans' cause of action accrued prior to June 14, 1979, and that the alleged violations did not constitute a continuing conspiracy. The court therefore held that the Hennegans' action was barred by the four-year statute of limitations, 15 U.S.C. § 15b, and granted summary judgment.

II

We review de novo the district court's grant of summary judgment. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). We must determine whether there is any genuine issue of material fact and whether the substantive law was correctly applied. *Id.*

A.

We first address the Hennegans' contention that their action is not barred by the statute of limitations because they have alleged a continuing conspiracy within the limitations period. The Hennegans argue that, irrespective of when their cause of action first accrued, the tour operators and souvenir vendors have, in furtherance of the conspiracy, committed overt acts within the limitations period that injured the Hennegans' business. Each of these overt acts within the limitations period, they argue, gave rise to a separate cause of action that is not barred by the statute of limitations. Accordingly, the Hennegans assert that they are entitled to pursue their action to recover damages for all injuries caused by the overt acts within the limitations period.

Suits for damages from antitrust violations must be brought "within four years after the cause of action accrued." 15 U.S.C. § 15b. " 'A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time.' " *AMF, Inc. v. General Motors Corp. (In re Multi-district Vehicle Air Pollution)*, 591 F.2d 68, 70 (9th Cir.) (bracketed text in cited authority) (*Air Pollution*), *cert. denied*, 444 U.S. 900, 100 S. Ct. 210, 62 L. Ed. 2d 136 (1979), *quoting Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F. 2d 1264, 1270 (9th Cir. 1975); *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 806 (1971). When an overt act in furtherance of an antitrust conspiracy damages the plaintiff within the limitations period, the plaintiff possesses a cause of action for that damage that is not barred by the statute of limitations. *See Air Pollution*, 591 F.2d at 70-71. Here, the Hennegans have alleged numerous overt acts since June 14, 1979. These overt acts include the payments by the souvenir vendors to the tour operators and the tour operators' shepherding of tourists away from the Hennegans' shop and to the shops of the souvenir vendors. Therefore, we hold that the statute of limitations does not bar the Hennegans from seeking damages for injuries inflicted after June 14, 1979.

This result is consistent with, and supported by our opinion in *Air Pollution. See Western Shoe Gallery, Inc. v. Duty Free Shoppers, Ltd.*, 593 F. Supp. 348, 352 & n.4 (N.D. Cal. 1984) (*Western Shoe*). In *Air Pollution*, AMF, Inc. (AMF) alleged that four major American automobile manufacturers and their trade association (automobile manufacturers) had conspired to exclude AMF from the developing market for afterburners. 591 F.2d at 69. The automobile manufacturers had made the final decision not to purchase afterburners from AMF outside the limitations period. *Id.* at 71. AMF argued that its action was not barred by the statute of limitations since it alleged a continuing conspiracy, with overt acts by the automobile manufacturers within the limitations period causing damage to AMF. These alleged overt acts consisted of a negative response by one of the automobile manufacturers to a contact initiated by AMF, as well as efforts by each of the automobile manufacturers to achieve government certification of its own emission control system. *Id.*

In *Air Pollution*, we reaffirmed the rule that an antitrust conspiracy begun outside the limitations period is actionable if new overt acts in furtherance of the conspiracy damage the plaintiff within the limitations period. *Id.* at 70-71. We found, however, that all injury to AMF resulted from the automobile manufacturers' "irrevocable, immutable, permanent and final" decisions, outside the limitations period, not to purchase the afterburners from AMF. *Id.* at 72. As we pointed out, to integrate the projected afterburners into new automobiles would require considerable lead time—developing not only afterburner design but automobile design as well—to assure successfully integrated full-car designs. Thus, once the automobile manufacturers embarked upon their own programs of afterburner development, the market for AMF's new car afterburners effectively disappeared. AMF could no longer produce afterburners that would be marketable even if the manufacturers refrained from any further acts of conspiracy. We concluded that these initial decisions made prior to the limitation period completely and permanently excluded AMF

from the market. Consequently, no separate injury flowed from the alleged overt acts within the limitations period. *Id.*

The circumstances such as were present in *Air Pollution* do not exist here. The alleged actions outside the limitations period did not immediately and permanently destroy the Hennegans' business, nor were they "irrevocable, immutable, permanent and final." The Hennegans instead allege that they have suffered damage from continued, separate antitrust violations within the limitations period. The rule that we reaffirmed in *Air Pollution* therefore requires that we hold that the Hennegans' action to recover for these separate violations occurring within four years prior to its filing is not barred by the statute of limitations.

The district court erroneously based its contrary holding on *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.) (*Orgell*), *cert. denied*, 454 U.S. 816, 102 S. Ct. 92, 70 L. Ed. 2d 84 (1981). In *Orgell*, the defendant, in response to plaintiff's inquiries, had refused to sell its goods to the plaintiff on several occasions over a period of twelve years. *Id.* at 937. Two of these refusals occurred within the limitations period. *Id.* Relying directly on *Air Pollution*, we held that the action was barred by the statute of limitations, because defendant's inital refusal to sell was " 'irrevocable, immutable, permanent and final.' " *Id.* at 938, *quoting Air Pollution*, 591 F.2d at 72.

In ruling that the Hennegans' action was barred by the statute of limitations, the district court apparently read *Orgell* as holding that a continuing refusal to deal cannot be a continuing conspiracy. However, *Orgell* merely applies *Air Pollution*. While it is not evident from the brief factual summary how the defendant's initial refusal to sell caused all the injury to the plaintiff, we clearly held that the case was governed by *Air Pollution* and certainly did not purport to create a rule inconsistent with *Air Pollution*. Therefore, we conclude that *Orgell* cannot sustain the ruling that the Hennegans' action is barred by the statute of limitations. *See Western Shoe*, 593 F. Supp. at 352 & n.4 (distinguishing *Orgell*).

B.

The Hennegans further argue that they may recover damages for injuries inflicted prior to the limitations period since they did not know of the alleged activities of the tour operators and souvenir vendors prior to this period. In essence, the Hennegans contend that their lack of knowledge tolled the statute of limitations for any causes of action that accrued prior to June 14, 1979.

Ignorance of an antitrust cause of action alone is insufficient to toll the statute of limitations. Under the equitable doctrine of fraudulent concealment, however, the statute of limitations for a cause of action is tolled if the plaintiff proves that the defendant fraudulently concealed the existence of the cause of action so that the plaintiff, acting as a reasonable person, did not know of its existence. *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978).

The Hennegans have not alleged specific facts showing that the tour operators and souvenir vendors engaged in affirmative conduct that fraudulently concealed the existence of a cause of action. *See id.* at 250. Furthermore, the Hennegans have not shown that they neither knew nor should have known prior to June 14, 1979, that the alleged activities of the tour operators and souvenir vendors gave them a cause of action. Instead, the record indicates the contrary. In a prior, successful motion to disqualify a defense law firm, the Hennegans alleged that they had retained a lawyer in that firm in January 1979 in a matter involving "the same circumstances and commercial conditions that are the subject of the instant antitrust action." The Hennegans specifically cited a letter written by that lawyer on their behalf in March 1979 that complained that tour operators were shepherding tourists away from their shop. In addition, in a prior separate action, the Hennegans acknowledged that they were aware before 1979 of the alleged practice of payments by souvenir vendors to tour operators for bringing tourists to their shops.

Under these circumstances, the Hennegans' allegations of fraudulent concealment are unpersuasive. The Hennegans are

therefore barred by the statute of limitations from pursuing recovery of damages for injuries inflicted prior to June 14, 1979.

III

We hold that the Hennegans are entitled to pursue recovery of damages from overt acts proven to be in furtherance of the alleged conspiracy which occurred within the limitations period (i.e., since June 14, 1979). The Hennegans are not entitled, however, to seek to recover damages for injuries alleged to have been inflicted prior to the limitations period.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX B

Order Of The United States Court Of Appeals For The Ninth Circuit Denying Defendants' Petition For Rehearing And Rejecting Defendants' Suggestion For Rehearing En Banc (Filed June 11, 1986)

FILED
JUN 11 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2563

D.C. No. C 83 83-0040 CCD

ORDER

THOMAS J. HENNEGAN and GLORIA HENNEGAN,

Plaintiff-Appellants,

—vs.—

PACIFICO CREATIVE SERVICE, INCORPORATED d/b/a JALPAK, MICRONESIAN HOSPITALITY, INC., RIC TOURS "GUAM", INC., YUSEN AIR AND SEA SERVICE PACIFIC, INC., et al.,

Defendants-Appellees.

Appeal from the District Court of Guam

Before:

WALLACE, ANDERSON, and PREGERSON,
Circuit Judges.

The panel, as constituted above, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

Memorandum Order of the District Court of Guam Granting Defendants' Motion for Summary Judgment (Filed September 5, 1984)

FILED
DISTRICT COURT OF GUAM
AGANA, GUAM
SEP 5 2:43 PM '84
EDWARD L. G. AGUON
CLERK, DISTRICT COURT OF GUAM

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Civil Case 83-0040

MEMORANDUM ORDER

THOMAS J. HENNEGAN and GLORIA E. HENNEGAN,

Plaintiffs,

—vs.—

PACIFICO CREATIVE SERVICE, INCORPORATED, d/b/a Jalpak,

—and—

MICRONESIAN HOSPITALITY, INC.,

—and—

RIC TOURS "GUAM", INC.,

—and—

YUSEN AIR AND SEA SERVICE PACIFIC, INC.,
d/b/a Diamond Tours,

—and—

J.B. SIAOTONG ENTERPRISE, INC.,
d/b/a Guam Travel Bureau,

—and—

DUTY FREE SHOPPERS, LTD.,

—and—

HAKUBOTAN ENTERPRISES, INC.,

Defendants.

The Plaintiffs filed this action against the Defendants on June 14, 1983, alleging that the defendants Duty Free Shoppers, Ltd., (hereinafter referred to as "DFS") and Hakubotan have engaged in illegal restraints of trade in violation of 15 U.S.C. Section 3 by conspiring with Defendants Jalpak, Ric Tours "Guam", Inc., Diamond Tours Guam, Guam Travel Bureau, and Micronesian Hospitality, Inc., (hereinafter referred to as "Jalpak", "Ric Tours", "Diamond Tours", "Guam Travel", and "Micronesian", respectively), to refuse to deal with Plaintiffs. The Plaintiffs allege that the basis for the alleged group boycott by the Defendants is that the Defendants DFS and Hakubotan have paid certain commission payments to the remaining Defendants which allegedly constitute commercial bribery in violation of 15 U.S.C. Sections 3 and 13 and the Plaintiffs have refused to make such commission payments.

At the time the complaint was filed, Defendants Micronesian, Jalpak, and Diamond Tours were represented by Attorney Andrew Gayle. The Plaintiffs on December 12, 1983, filed a motion to disqualify Attorney Gayle from representing Defendants Micronesian, Jalpak, and Diamond Tours on the grounds that the representation of these Defendants by Attorney Gayle created a conflict of interest since Attorney Gayle

had represented the Plaintiffs beginning in January, 1979, in a matter involving "the same circumstances and commercial conditions that are the subject of the instant antitrust action." (Plaintiffs' Motion to Disqualify Counsel, filed December 12, 1983, at p.3.) After hearing oral argument, this Court determined that a conflict of interest existed and granted the Plaintiffs' Motion to Disqualify Attorney Gayle from representing Defendants Micronesian, Jalpak, and Diamond Tours in this action.

The Defendants subsequently filed a Motion for Summary Judgment on the grounds that the Plaintiffs' suit is time-barred by 15 U.S.C. Section 15b, the four-year statute of limitations governing antitrust actions, since the Plaintiffs were aware of the Defendants' alleged final refusal to deal and the alleged circumstances surrounding such refusal prior to June 14, 1979. This Court took the matter under advisement.

DISCUSSION

As previously noted, the Defendants contend that the Plaintiffs' action is time-barred by the four-year statute of limitations governing antitrust actions since the Plaintiffs' cause of action accrued more than four years before the commencement of the Plaintiffs' instant lawsuit. Section 15b of 15 U.S.C. states as follows:

> Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

The Plaintiffs, however, maintain that the cause of action did not accrue prior to the commencement of the four-year statute of limitations period (June 14, 1979), and, alternatively argue that no matter when this cause of action accrued, it continues to this day by the very nature of the continuing conspiracy between the Defendants. The Plaintiffs cite, in

support of their continuing conspiracy proposition, the fifth circuit case of *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029 (5th Cir., 1977). As previously noted, the Defendants maintain that the cause of action accrued prior to June 14, 1979. They additionally maintain that the law as set forth in *Imperial Point*, *id.*, is not the law of the Ninth Circuit. This Court is in full agreement with both positions of the Defendants. The Ninth Circuit in *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir., 1981), *cert. den.* 454 U.S. 816, 102 S. Ct. 92 (1981), held that defendant Geary's initial refusal to sell its chinaware to plaintiff retailer Orgell, allegedly based on a conspiracy between defendant Geary and plaintiff's principal competitor, triggered the running of the four-year statute of limitations governing antitrust actions. The Ninth Circuit further held that subsequent refusals by defendant Geary to sell its products to plaintiff did not create new antitrust causes of action but were merely reaffirmations of its original decision not to deal with the plaintiff.

In the case at bar, the Plaintiffs by their own assertions and admissions have set forth that not only were they aware of the alleged "boycott" by the Defendants in January, 1979, but that they were also aware of the fact that commissions had to be paid to tour guides of the Defendant tour companies in order to get Japanese tourist business.

As mentioned previously, the Plaintiffs stated in their written motion to disqualify Attorney Gayle from representing Defendants Micronesian, Jalpak, and Diamond Tours, that "the circumstances underlying the 1979 representation of Plaintiffs by Andrew M. Gayle and [his law firm] are the same circumstances and commercial conditions that are the subject of the instant antitrust action". (Plaintiffs' Motion to Disqualify filed December 12, 1983, at p.3.)

The Plaintiffs further argued in their Memorandum in Support of the Motion to Disqualify Attorney Gayle, that:

> . . . [T]here is nothing disputing the relationship between the matters currently being litigated and those

> involved in the former representation of Plaintiffs by [Mr. Gayle's firm]. In both instances, the rigid control exercised by Guam tour companies over Japanese tourists, who are shepherded from place to place without much opportunity to go any place or buy anything not approved by their tour companies, lies at the heart of the matters disputed . . . (Letter of Attorney Gayle dated March 30, 1979.) Here, the *same* alleged control forms the basis of Plaintiffs' antitrust action. . . . (Emphasis added.) (Plaintiffs' Memorandum filed December 12, 1984, at pp. 2-3.)

Furthermore, at the hearing on the Motion to Disqualify Attorney Gayle, Plaintiff, Mr. Hennegan, testified on direct examination that the Plaintiffs had discussed with Attorney Gayle in January, 1979, the pattern of Japanese tourists avoiding his souvenir stand and that he had informed Mr. Gayle, at that time, that all the Defendant tour companies named in this suit were practicing this pattern. (Transcript of Motion to Disqualify dated January 6, 1984, pp. 10-13.)

Mr. Hennegan also made a statement in his affidavit dated December 30, 1983, in support of his Motion to Disqualify Attorney Gayle, that he had received ". . . discreet advice from certain tour guides that the tourists were actually advised to avoid our stand." When questioned on cross-examination at the hearing for the Motion to Disqualify Attorney Gayle about nature of this discreet advice, Mr. Hennegan testified that the tour guides told him "that they were being instructed by their management to have the tourists avoid our stand." (*Id.* at p.14). Mr. Hennegan further stated on cross-examination that, in early 1979, he knew that his souvenir stand was being "boycotted; there was no doubt about it". (*Id.* at p.15).

In fact, Mr. Hennegan even testified that in 1976, Mrs. Hennegan made commission payments to a tour guide for Japanese tourist business and Mrs. Hennegan testified that she paid commission payments to another tour guide in 1977 or 1978. [Transcript of the trial of *Holden v. Hennegan*, Civil No. 23-81, Guam Superior Court, dated August 17-20, 1981, ap-

peal dismissed January 4, 1984 (District Court of Guam Appellate Division, Civil Case No. 81-0072A) at pp. 302 and 248.] There was further testimony by Mr. Hennegan that the Plaintiffs were aware of at least one other vendor who was allegedly paying commissions. *Id.*, at 263. And both Plaintiffs testified that they believed that paying commissions was necessary to obtain Japanese tourist business. (*Id.* at 248, 287-288.)

Thus, based on the foregoing, it is apparent that the Plaintiffs were aware of the Defendants' alleged refusal to deal and the alleged circumstances surrounding such refusal prior to June 14, 1979, and are thus barred from commencing this action by Section 15b of 15 U.S.C., the four-year statute of limitations governing antitrust actions.

There being no genuine issue of material fact in dispute, the Defendants' Motion for Summary Judgment is granted as a matter of law.

It is so ordered.

Dated this 5th day of September, 1984.

/s/ CRISTOBAL C. DUENAS
Cristobal C. Duenas
Judge, U.S. District Court of Guam

APPENDIX D

Rule 28.1 Statement of Petitioner Duty Free Shoppers, Ltd.

DFS Group Limited
Classic Jewellers International Limited
Classic Leather Ltd.
Le Classique (Private) Limited
Duty Free Shoppers K.K.
Duty Free Shoppers Group Limited
International Credit Systems Ltd.
Le Classique Duty Free Shoppers Limited
Duty Free Shoppers Palau, Ltd.
CBOS Limited
Duty Free Shoppers Limited (CNMI)
Duty Free Shoppers N.V.
Clarisse Company Limited
Preferred Products Limited
CBOS N.V.
DFS Marketing Pty. Ltd.
DFS (Private) Limited
Preferred Products (Private) Ltd.
Commonwealth Investment Company, Inc.
Aero Shops, Inc.
Aero Shops Limited
RHC Luggage, Inc.
Duty Free Shoppers LAX, Inc.
Ukana Limited N.V.
Hawaiian King Candies Limited
Duty Free Shoppers JFK, Inc.
DFS North America, N.V.
Duty Free Shoppers (Private) Limited
Le Classique (Macau) Limited
Le Classique Limited
International Gift Shop, Inc.
42269 Ontario Limited

DFS Group Limited (Panama)
DFS 1984 (Thailand) Limited
Duty Free Shoppers Macau Limited
Proffer Company Limited
DFS Group Ltd. (CNMI)
Duty Free Shoppers North America Inc.

Rule 28.1 Statement of Petitioner
Micronesian Hospitality, Inc.

Pacifico Creative Service, Inc. (*see* Rule 28.1 Statement of Petitioner Pacifico Creative Service, Inc.)
Baba Corporation
MHI Japan (a Japanese corporation)
Nippon Rent A Car Service of Guam, Inc.
Plaza, Inc.
Phonex International

Rule 28.1 Statement of Petitioner
Yusen Air and Sea Service Pacific, Inc.

Yusen Air & Sea Service Co. Ltd.
(Japanese parent corporation)

Rule 28.1 Statement of Petitioner
Ric Tours "Guam", Inc.

R & C Tours (Guam), Inc.

Rule 28.1 Statement of Petitioner
Hakubotan Enterprise, Inc.

Hakubotan Enterprise, Inc. has no parent company, subsidiary (except wholly owned subsidiaries) or affiliate as those terms are used in Supreme Court Rule 28.1.

Rule 28.1 Statement of Petitioner
J.B. Siaotong Enterprises, Inc.

J.B. Siaotong Enterprises, Inc. has no parent company, subsidiary (except wholly owned subsidiaries) or affiliate as those terms are used in Supreme Court Rule 28.1.

Rule 28.1 Statement of Petitioner Pacifico Creative Service, Inc. (now known as Creative Tours Micronesia, Inc.)

Japan Air Lines Co., Ltd. (indirect Japanese parent corporation).